IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

R.S.A. No. 154 of 1990
Date of Decision: 22.12.2006

Jai Narain.

..... Appellant

Versus

Smt.Saraswati Devi and another.

..... Respondents

CORAM: Hon'ble Mr.Justice Mahesh Grover

....

Present: Shri C.B. Goel, Advocate for the appellant.
Shri Amit Jain, Advocate for respondent no.1.
Shri Ramesh Kumar, Advocate for respondent no.2.

....

Mahesh Grover,J.

Defendant-Jai Narain has filed the present Regular Second Appeal challenging the judgment and decree dated 19.9.1989 of the Additional District Judge, Gurgaon (hereinafter described as `the lower Appellate Court') by which the findings recorded in the judgment and decree dated 17.8.1988 of the Sub Judge Ist Class, Gurgaon (hereinafter referred to as `the trial Court') were reversed.

The facts of the case are that one Kishori Lal, father of the plaintiff-respondent no.2 and husband of defendant-respondent no.1 was owner in possession of house no.365/5, situated in Jacobpura, Gurgaon as

depicted in the site plan, Exhibit P1. Kishori Lal died in the year 1973 and the respondents came to be owners in possession of the said house. It was pleaded that the respondents are governed by the Hindu Succession Act and the house in question devolved upon them in equal shares entitling each to be owners to the extent of ½ share. It was further pleaded that respondent no.2 is residing with respondent no.1 in the same house. Respondent no.1-Smt.Saraswati Devi is an illiterate lady and the appellant by playing fraud upon her got an agreement to sell executed in his favour in respect of the suit house. Respondent no.1 could not have entered into any agreement to sell in excess of her half share of the suit property.

Further, that on the basis of the aforesaid agreement to sell, the appellant filed a suit for specific performance which was decreed in his favour on 26.11.1985 and he was persisting with the execution of the sale deed through Court. The said decree dated 26.11.1985 was also assailed as being illegal and not binding upon the rights of respondent no.2.

On the strength of the afore-stated pleadings, respondent no.2 prayed for a decree of declaration to the effect that she was owner in possession as co-sharer to the extent of ½ share of the suit property and the decree in the suit titled “Jai Narain Versus Smt.Sarsawati Devi” decided on 26.11.1985 is illegal, void and not binding upon her.

The appellant, who was arrayed as defendant no.1, contested the suit by denying the ownership of respondent no.2 to the extent o ½ share of the house in question. It was also denied that Kishori Lal, father of respondent no.2 was owner of the said house. Rather, it was pleaded that respondent no.1 was absolute owner of the house in question and agreement to sell dated 22.9.1982 was validly executed for a consideration

of Rs.35,000/-. A sum of Rs.10,000/- was paid as earnest money as part payment of the sale consideration. The suit for specific performance was filed after attempts to get the sale deed executed did not bear any fruit. The said suit was decreed on 26.11.1985 and respondent no.1 was directed to hand over the possession of the house in question within 30 days of payment of the balance sale consideration. It was further averred in the written statement that Ginni-respondent no.2 had appeared as a witness in that suit and had never asserted herself to be the co-sharer and the only plea taken up was that the sale consideration was, in fact, Rs.45,000/- and not Rs.35,000/- and a fraud to this extent has been practised by the appellant upon respondent no.1, her mother.

Respondent no.1, who was arrayed as defendant no.2, chose not to contest the suit and was proceeded against ex parte.

On the pleadings of the parties, the following issues were framed:-

1. Whether the plaintiff is daughter of defendant no.2?OPP
2. Whether Kishori Lal father of the plaintiff has expired after 1956?OPP
3. Whether plaintiff is the owner of half share of the house in dispute?OPP
4. Whether decree in civil suit no.402 dated 13.5.83 titled Jai Narain Vs. Saraswati Devi decided on 26.11.85 is illegal, void and not binding against half share of the plaintiff in the house in dispute?OPP
5. Whether plaintiff has no locus standi to file the present suit?OPD

6. Whether the plaintiff is estopped by her own act and conduct?OPD

7. Whether the suit is not maintainable?OPD

8. Whether suit is not within limitation?OPD

9. Whether the suit is not properly valued for the purpose of court fee and jurisdiction?OPD

10. Whether suit is malafide, if so, to what effect?OPD

11. Relief.

The learned trial Court, vide its judgment and decree dated . 17.8.1988 held under issue no.1 that respondent no.2 is the daughter of respondent no.1 and under issue nos. 2 and 3, it was found that Kishori lal had died in the year 1973 and respondent no.2 was held to be owner to the extent of ½ share of the disputed house, but the suit was dismissed by holding that respondent no.2 was estopped from filing the same by her own act and conduct.

The appeal filed by respondent no.2 was accepted by the learned lower Appellate Court vide its judgment and decree dated 19.9.1989 declaring respondent no.2 to be the owner in possession as co-sharer to the extent of ½ share of the disputed house and held that the decree dated 26.11.1985 in suit no. 402 of 13.5.1983 passed by the Senior Sub Judge, Gurgaon was illegal and not binding on her to the extent of 1/2 share of the disputed property.

The aforesaid judgment and decree of the learned lower Appellate Court have been assailed in the present appeal by the appellant.

It was contended by Shri C.B.Goel, learned counsel for the appellant that the agreement to sell had been validly executed and a decree

in the suit for specific performance had also been passed wherein the plea of fraud which was the only plea was completely negatived. Once, the decree aforestated had been passed, the same could have been challenged by filing an appeal which was not done and in a subsequent suit for declaration, a valid decree which had come into existence could not have been defeated. Besides, respondent no.2 had appeared as a witness in the aforementioned case and she had not claimed her ownership. Learned counsel further contended that respondent no.2 is estopped by her own conduct to file the instant suit. In support of his contentions, he relied upon the judgments reported as AIR 1981 S.C. 2128 – K.C.Kapoor Vesus Smt.Radhika Devi (dead) by L.Rs. & Ors. And AIR 1979 P.&H. 12 -Ujagar Singh Versus Sham Singh and others.

It was also contended that the following substantial questions of law arise for consideration of this Court:-

1. Whether a valid decree granted by the Court of competent jurisdiction could be set aside in a subsequent suit for declaration in the absence of any appeal having been filed challenging the validity of the said decree?
2. Whether respondent no.2 was estopped by her own conduct to challenge the decree dated 26.11.1985 in the absence of any plea having been raised by her regarding her ownership?

The aforesaid contentions were refuted by the learned counsel for respondent no.2, who contended that there was absolutely no bar for respondent no.2 to assert her right of ownership through the subsequent suit specially in view of the fact that the property had devolved upon her by way of natural succession and that the agreement to sell was erroneous as

respondent no.1 had no right to alienate her share of the property. In support of his contention, he relied upon the judgments reported as AIR 1971 Patna 185 – Langa Manjhi and others Versus Jaba Majhian and others and 1989 P.L.J. 424 – Indian Oil Corporation Versus The Municipality, Thanesar. It was further contended that the conduct of respondent no.2 in appearing as a witness in the earlier suit and not claiming the ownership of the suit property to the extent of ½ share, as also in appending her thumb impression on the subsequent sale deed dated 7.9.2006 executed by respondent no.1 cannot be termed to be an estoppel and the right of succession could only have been relinquished by her by executing a deed to that effect. Respondent no.2 was not a party in the suit for specific performance and, therefore, the decree could not bind her, much less affect her right of succession.

Before commencing to determine the controversy, it would be apt to notice another fact which is borne out from the record that at the time of admission of the appeal, the alienation of the suit property was stayed, but despite that respondent no.1 sold the suit property to some other person and respondent no.2 appended her thumb impression to the said sale deed. A copy of sale deed dated 7.9.2006 was placed on record along with the substantial questions of law as formulated by the learned counsel for the appellant. C.M.No.10777-C of 2006 was also filed by the appellant for taking action against the respondents under Order 39 Rule 2-A read with Section 151 of the Code of Civil Procedure for willful disobedience of the order of injunction.

I have heard learned counsel for the parties at some length and have perused the record.

The foremost question that is to be considered is as to whether a decree granted by the Court of competent jurisdiction can be set aside in a declaratory suit subsequently in the absence of any appeal having been filed against the said decree. On examination of the facts of this case, it transpires that respondent no.1 had suffered an agreement to sell in favour of the appellant which was not honoured leading to the filing of a suit for specific performance by him. The suit was contested by respondent no.1 and respondent no.2 appeared as a witness. In her testimony as DW2 in the said suit, respondent no.2 nowhere stated that the property had devolved upon her and her mother (the executor of the agreement to sell) in equal shares. Rather, only a plea of fraud was set up which was limited to the extent of the amount of consideration being Rs.45,000/- instead of Rs.35000/-. She also testified that no protest was made against the said fraudulent action of the appellant.

The cumulative effect of her statement in the backdrop of the facts of the case is that respondent no.2 failed to assert her right before the Court in the first opportunity she got. Besides, even respondent no.1 did not assail decree dated 26.11.1985 by filing an appeal. The findings, therefore, attained finality.

In a subsequent suit for declaration, a validly suffered decree could have been challenged only on the ground of having it been obtained by fraud, concealment or misrepresentation. No such plea was taken by respondent no.2. Indeed, respondent no.2 was not precluded from seeking to establish her right over the suit property, if any, but, if the declaratory suit was filed only with an intent to defeat the execution of a sale deed on the basis of the validly passed decree and to defeat the right of the appellant,

then the proceedings could only be termed to be tainted and as an abuse of the process of law. The instant suit was filed on 19.2.1986 soon after the passing of the decree in favour of the appellant in the suit for specific performance on 26.11.1985. This coupled with the fact that during the pendency of this appeal, on 7.9.2006, a sale deed has been executed by respondent no.1 alone only lends credence to the fact that the entire proceedings were motivated to defeat the rights of the appellant.

A reading of the statement (Exhibit D2) of respondent no.2 in the earlier suit for specific performance does not reveal any assertion of her right to the suit property, more-so when the succession stood open as Kishori Lal had already expired. The statement further reveals that she was residing in her matrimonial house which is contrary to the pleadings in the present suit where she has asserted that she is staying with respondent no.1, her mother. Respondent no.2 was, therefore, clearly estopped by her own conduct from pleading ownership of the property by way of succession.

The contention of the learned counsel for respondent no.2 that estoppel is a question of fact and cannot be interfered with in a Regular Second Appeal is belied by the observations of this Court in Ujagar Singh Versus Sham Singh and others (supra) that “estoppel is not a question of fact, but an inference of law from the facts proved and is, therefore, open to examination by the High Court in Second Appeal.”

The argument of the learned counsel for respondent no.2 that the aforementioned conduct of respondent no.2 could not be termed as estoppel would have carried immense weight, had respondent no.1 not executed sale deed dated 7.9.2006 to which she had appended her thumb impression which is a testimony of her tacit consent not only to the

alienation of the suit property, but also to the fact that respondent no.1 was the sole owner of the same.

For the foregoing reasons, the appeal of the appellant is allowed and the questions of law as formulated in the earlier part of the judgment stand answered as above. As a consequence thereof, the judgment and decree dated 19.9.1989 are set aside and those of the trial Court are restored vide which the suit of respondent no.2 was dismissed.

December 22,2006 (Mahesh Grover)
"SCM" Judge